

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THE UNITED STATES for the use of)
GMW Fire Protection, Inc., an Alaska)
Corporation,)

Plaintiff,)

vs.)

KANAG'IQ CONSTRUCTION CO.,)
INC., an Alaska Corporation and)
WESTERN SURETY COMPANY, a)
South Dakota Corporation,)

Defendants.)

Case No. A05-170 Civil (TMB)

**REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE
TO STRIKE PLAINTIFF'S EXPERT -- BARRY STEINKRUGER**

I. Facts

The Defendants filed a motion in limine to strike the Plaintiff's expert, Barry Steinkruger. The Defendants argued that since the Plaintiff failed to abide by Federal Rule of Civil Procedure 26(a)(2), Plaintiff's expert was barred from testifying under Federal Rule of Civil Procedure 37(c)(1). In support of its position, the Defendants observed that its motion was supported by case law, as well as the plain text of the rules and accompanying commentaries.

The Plaintiff opposed the Defendants' motion, arguing that the majority of the requirements under Rule 26(a)(2) are inapplicable because its expert will not be

1 providing an opinion, but will instead be providing a topical dissertation. The Plaintiff's
2 argument is absurd and unworthy of further consideration.

3 II. Argument

4 Rule 26(a)(2) provides that

5 Except as otherwise stipulated or directed by the court, this disclosure shall,
6 with respect to a witness who is retained or specially employed to provide
7 expert testimony in the case or whose duties as an employee of the party
8 regularly involve giving expert testimony, be accompanied by a written
9 report prepared and signed by the witness. The report shall contain a
10 complete statement of all opinions to be expressed and the basis and
11 reasons therefor; the data or other information considered by the witness in
12 forming the opinions; any exhibits to be used as a summary of or support
13 for the opinions; the qualifications of the witness, including a list of all
14 publications authored by the witness within the preceding ten years; the
15 compensation to be paid for the study and testimony; and a listing of any
16 other cases in which the witness has testified as an expert at trial or by
17 deposition within the preceding four years.

18 The requirements of this rule are easy to read and obey. The rule requires expert
19 disclosures to contain certain information the Plaintiff has apparently intentionally failed
20 to include. The Rule does not allow a party to decide for itself which requirements are
21 applicable to it and does not indicate that the requirements are inapplicable if an expert
22 will be providing a topical discussion so a finder of fact can draw its own conclusions.
23 This approach begs for inconsistent results and a dilatory practice: one side could always
24 provide an inadequate disclosure and in order to keep the benefit of their expert's
25 testimony, simply argue their expert will provide a dissertation rather than an opinion.

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1 The distinction the Plaintiff attempts to make between opinion testimony and a
2 topical dissertation is a baseless argument. First, the Plaintiff cites no authority for the
3 proposition that if an expert will provide testimony on a topic which requires an expert,
4 rather than an opinion, it no longer has to disclose what material the expert reviewed and
5 what the experts opinion is. Additionally, in his report, Mr. Steinkruger prepared a
6 paragraph under the heading "*Opinions to be expressed*", so he is apparently under the
7 impression that he has an opinion about the subject he will be testifying about, despite the
8 Plaintiff's assertion that he does not.

10 The weakness of the Plaintiff's argument can be best pointed out by way of
11 hypothetical. Mr. Steinkruger has indicated in his report that he intends to express
12 opinions which "will explain the defferenences (sic) in cost, installation, programming,
13 and maintenance of different types of Fire Alarm Systems. Specifically, the differences
14 between a traditional hard wired system and an addressable systems (sic)." Despite the
15 Plaintiff's assertion Mr. Steinkruger has no opinion, if one assumes the first question the
16 Plaintiff asks Mr. Steinkruger after laying a foundation is "what are the differences
17 between hard wired systems and an addressable system", the answer Mr. Steinkruger
18 would give is an opinion. His report alone indicates he has taken a position on certain
19 differences between systems and the Defendants are entitled to know, without asking,
20 what his opinions are and what information he reviewed in coming to these conclusions.
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1 As previously briefed by the Defendants, Rule 26(a)(2) is meant to facilitate the
2 disclosure of more information than would be learned following responses to expert
3 witness interrogatories. Expert witness disclosures are supposed to be detailed enough
4 that other discovery related to an expert is unnecessary and a party can prepare a
5 thorough cross-examination and determine if it needs its own expert, based on the report
6 alone. From the Plaintiff's disclosure, none of these objectives can be accomplished.

7
8 Lastly, Rule 37(c)(1) requires the exclusion of the expert's testimony if the
9 requirements of Rule 26 were not met. This Rule is meant to encourage the parties to be
10 accountable for their practices and to exclude foolish and unproductive gamesmanship.
11 The Defendants suggest it is exactly situations such as the one at bar which Rule 37(c)(1)
12 was designed to do away with and this Court should not hesitate to enforce a Rule which
13 exists to provide a benefit to all who practice before it.
14

15 **III. Conclusion**

16 The Plaintiff has failed to provide information required under Rule 26(a)(2) and
17 has asserted the Rule does not apply to it, arguing its expert will not express an opinion.
18 The Plaintiff is wrong. The Plaintiff's own expert prepared a report which indicates he
19 intends to express opinions and there is no conceivable scenario by which his testimony
20 would not include his opinions. The fact that his proposed testimony might also include a
21 topical dissertation does not mean that the Defendants are not entitled to know what
22 information he based his proposed testimony upon or the substance of his testimony
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including any opinions. The Plaintiff has not met its responsibilities under Rule 26.
Under Rule 37, its expert cannot testify.

DATED at Anchorage, Alaska this 24th day of July 2006.

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CERTIFICATE OF SERVICE

Patti J. Juliussen certifies as follows:

That I am a legal secretary employed by the
law firm of Eide, Gingras & Pate, P.C. That
on this 24th day of July 2006, I served by

☒ Electronically

a true and accurate copy of the foregoing
document upon the following counsel of record:

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Patti J. Juliussen

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